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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re R.C., A Person Coming Under the Juvenile Court Law.	B204405 (Los Angeles County Superior Ct. No. KJ25097)
THE PEOPLE, Plaintiff and Respondent, v. R.C., Defendant and Appellant.	

APPEAL from post-judgment orders of the Superior Court of Los Angeles County. Daniel S. Lopez, Judge. Affirmed in part, reversed in part and remanded with directions.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Thomas Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After five years as a ward of the juvenile court, R.C. was found to be in violation of his probation, and he was committed to the Division of Juvenile Justice (DJJ). He contends (1) he was statutorily ineligible for a DJJ commitment, (2) the court abused its discretion in committing him, (3) the court failed to exercise discretion in setting the maximum term of physical confinement, and (4) the court erred by failing to find that he was a special education student and transferring his current Individual Education Plan (IEP) to the DJJ. The last two contentions have merit; we affirm in part, reverse in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Then 13-year-old R.C. was declared a ward of the juvenile court in Orange County in 2002 after he admitted a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288. subd. (a)) and sexual battery (Pen. Code, § 243.4, subd. (d)(1)). The juvenile court determined the lewd and lascivious act was a felony, set the maximum term of physical confinement on that count at eight years, found Penal Code section 654 precluded separate punishment for the sexual battery, and placed defendant home on probation.

Another petition was filed in Orange County in 2003. There, defendant admitted one count of vandalism causing damage in excess of $400 (Pen. Code, § 594, subd. (b)(1)). The court found the offense was a felony, set a maximum term of physical confinement of three years, and continued defendant as a ward on probation at home, and set a maximum term of physical confinement of three years.

A Welfare and Institutions Code section 602 petition was filed against defendant in Los Angeles in 2004. Defendant admitted two counts of lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288. subd. (a)). The juvenile court sustained the petition, found both counts were felonies, set a maximum term of physical confinement of 10 years, and ordered him to a camp program for 40 to 48 weeks. Defendant's Orange County cases were transferred to Los Angeles County.

Defendant graduated from the camp program on December 14, 2004, and the juvenile court ordered him suitably placed in a facility that could address his "sexual deviant behavior issues." Defendant continued to display disruptive and sexually inappropriate behavior, resulting in a variety of placements.

On July 10, 2007, defendant's probation officer filed a Welfare and Institutions Code section 777 notice of probation violation. The notice alleged defendant, who was now an adult, left his placement facility without permission and engaged in inappropriate sexual activity.

At the contested probation violation hearing, the court heard testimony concerning defendant's sexual behavior with another ward residing in the facility. Defendant testified the other ward was responsible for the sexual encounter. Defendant admitted writing a sex questionnaire and walking away from the facility without permission.

The court sustained the allegation and found defendant in violation of his probation. The court continued defendant as a ward and committed him to the DJJ. The court set defendant's maximum term of physical confinement at 12 years, using eight years from the 2002 Orange County petition as the principal term, plus a subordinate term of four years from the 2004 Los Angeles petition.

DISCUSSION

1. Eligibility under Welfare and Institutions Code section 733, subdivision (c) for DJJ Commitment

Welfare and Institutions Code section 733, subdivision (c) bars the commitment of a ward to the DJJ if "[t]he ward has been or is adjudged a ward of the court pursuant to [Welfare and Institutions Code] Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of [Welfare and Institutions Code] Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code." Defendant argues "the most recent offense[s]" within the meaning of that statute are the probation violations. Because those violations, i.e., leaving a placement facility without permission and failing to obey all laws by engaging in delinquent behavior, are not enumerated in Welfare and Institutions Code section 707, subdivision (b) and are not sex offenses listed in Penal Code section 290, subdivision (d)(3), defendant argues the court lacked authority to commit him to the DJJ.

But the statute must be read in its entirety. DJJ eligibility is not determined based simply on "the most recent offense;" it depends on "the most recent offense alleged in any petition." A Welfare and Institutions Code section 777 notice of violation is no longer a "petition"; that changed with Proposition 21. And while a probation violation can result in the filing of new criminal charges, a probation violation itself is not a separate "offense."

Defendant's construction of Welfare and Institutions Code section 733, subdivision (c) "would impair the ability of both the executive and judicial branches to guide youthful reform and to ensure accountability for all offenders properly within the juvenile court's jurisdiction." (*In re Eddie M.* (2003) 31 Cal.4th 480, 500-501.)

Eliminating the potential of a DJJ commitment would also eliminate a powerful incentive for wards to comply with the conditions of their probation. Defendant's 2004 violation of Penal Code section 288, subdivision (a) constituted the "most recent offense alleged in any petition" and he was therefore statutorily eligible for a DJJ commitment.

Defendant also argues the trial court erred by requiring him to register as a sex offender. He failed, however, to provide any argument or citations to authority to support this contention. To the extent the argument was premised on a theory other than his construction of Welfare and Institutions Code section 733, subdivision (c), it is waived. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11.)

2. Abuse of Discretion in Committing Defendant to DJJ

Alternatively, defendant contends the juvenile court abused its discretion in imposing a DJJ commitment because (1) it failed to refer to any of the probation reports or discuss defendant's progress at the residential facility and (2) the evidence was insufficient to support a finding defendant left the facility without permission.

The latter contention is easily resolved. Defendant admitted he walked away from the facility without permission. It is of no moment that he believed staff knew he was leaving or that he returned of his own volition. In any event, two probation violation counts were sustained; and defendant does not challenge the sufficiency of the evidence on the second count, inappropriate sexual behavior with a minor co-resident in the facility.

We review the juvenile court's decision to commit appellant to the DJJ for abuse of discretion and indulge all reasonable supporting inferences. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) The court must find that a DJJ placement would likely benefit the ward and otherwise serve the statutory goals. (Welf. & Inst. Code, § 734; *Eddie M.*, *supra*, 31 Cal.4th at p. 488.) However, so long as the record is sufficient for appellate review, the court need not recite the statutory language on the record or state its

specific reasons for a DJJ commitment. (*In re Jose R.* (1983) 148 Cal.App.3d 55, 59; *In re Robert D.* (1979) 95 Cal.App.3d 767, 773.) The court may commit a ward to the DJJ without first attempting less restrictive placements. (*Eddie M.*, *supra*, 31 Cal.4th at p. 507.)

When ordering the DJJ commitment, the court did not recap defendant's history of criminal and inappropriate sexual behavior. It did, however, note the ineffectiveness of the current, less restrictive alternative and read defendant's sex questionnaire into the record. The court did find defendant's "sophistication to be beyond anything that the juvenile court can offer. County jail will warehouse him, specifically a D.J.J. sex offender program is the only option that I would consider." The court's commitment order states in part, "The court finds . . . [t]he mental and physical condition and qualifications of this youth render it probable that the youth will benefit from the reformatory discipline or other treatment provided by the California Youth Authority [now renamed the DJJ]."

Despite few comments by the court, the record itself demonstrates defendant's long history of inappropriate sexual behavior and failed placements. He came to the attention of the juvenile court in 2002 when he was 13 and in the seventh grade. He used force and intimidation and preyed on two younger children. The 2002 disposition placing defendant on probation and allowing him to live with his grandparents while receiving counseling was ineffective, as shortly thereafter defendant vandalized a preschool. The disposition for the April 2003 petition (continuing defendant on probation with conditions including restitution and 200 days in a community work program) was ineffective, as demonstrated by several known instances of defendant's inappropriate sexual behavior. A July 2003 probation report indicated defendant was "caught with children's underwear [he] had bought and was using to masturbate." In January 2004, when appellant was 15, he admittedly committed the two violations of Penal Code section 288, subdivision (a), which involved his touching and rubbing the

penis and buttocks of a significantly younger boy[1] at school. Defendant asked the boy to undress and stole the boy's underwear. When the police went to defendant's home, they found approximately 30 pairs of children's underwear in the garage rafters. Although defendant completed the court-ordered camp program, a probation report documented his "problematic" behavior at camp, including manipulative behavior toward adults and "intermittent suicidal gestures."

Subsequent placements were also ineffective, as shown by a June 2006 probation report recounting defendant's numerous transfers among facilities due to disruptive behavior, "sexual inappropriateness," "sexually 'acting out,'" "sexual misconduct," and being absent without leave several times. A placement report attached to the probation report stated defendant "does not seem committed to the sex offender program, he states he has no issues to work on, and when confronted by his peers about his inappropriate sexual behaviors he will walk out of group or shut down and ignore everyone. Staff continue to find sexually inappropriate letters to/from [defendant] and various people (he leaves the letters lying around). . . . [¶] [Defendant] exposed himself to another minor but first tried to get the other minor in trouble by saying he was afraid of him. [¶] He is making inappropriate sexual gestures to other residents and asking them to sexually act out with him. While at Day Program he continue [*sic*] to try to get out of staff eyesight with another minor. . . . [¶] When confronted by peers and staff he threatens to AWOL or kill himself or stated that he has a major drug problem." In the wake of this report, the court found defendant's compliance with his case plan unsatisfactory.

In July 2006, defendant entered a new group home. He appeared to improve his behavior and compliance, as probation reports indicate the placement facility did not report to the probation department any incidents of disruptive or unacceptable behavior for about one year. In early July 2007, however, the facility reported the sexual

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[1] The detention report indicated the victim was 11; the probation report said he was 8.

activity involving another ward and defendant's walking away from the facility without permission. The Welfare and Institutions Code section 777 violation notice expressly addressed the sex questionnaire and stated defendant admitted composing it. A copy of the questionnaire was attached to the notice. The notice further indicated that when the reporting probation officer asked defendant about his progress in his sexual offender program, he responded, "I'm not sure, I don't think I'm getting much out of it. I haven't really participated in it."

The record is sufficient for appellate review. (*In re Jose R., supra,* 148 Cal.App.3d at p. 59.) It supports the court's conclusion that defendant's previous placements were ineffective and that less restrictive alternatives than the DJJ's program for sexually deviant behavior would not protect the public or provide defendant with the care, treatment, and guidance that would both serve his best interests and hold him accountable for his behavior. (Welf. & Inst. Code, § 202, subds. (b), (d).)

3. Exercise of Discretion in Setting the Maximum Term of Physical Confinement

Welfare and Institutions Code section 731, subdivision (c) provides that a ward's maximum term of physical confinement at the DJJ may not be longer than the maximum term that could be imposed on an adult and "also may not be . . . in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court." In ordering R.C. committed to the DJJ, the juvenile court simply stated, "I do note his maximum confinement time, this court tabulating his maximum confinement time as 12 years – I'm sorry – 13 years six months – 12 years. His credits through today's date [equal] 427 days." Defendant argues this statement on the record is insufficient under Welfare and Institutions Code section 731, subdivision (c). We agree.

In *In re Jacob J.* (2005) 130 Cal.App.4th 429 (*Jacob J.*), the Court of Appeal concluded, "where, as here, the juvenile court sets the maximum term of physical confinement at CYA at the maximum term of an adult confinement, the record must show the court did so after considering the particular facts and circumstances of the matter before it." (*Id.* at p. 438.) The appellate panel added, "When the court has stated only the maximum term of confinement that could have been imposed on an adult and is silent as to a maximum term based on the facts of the case, it has not spoken the second, separate maximum called for by the amended statute. [¶] Thus, while the statute does not require a recitation of the facts and circumstances upon which the trial court depends, or a discussion of their relative weight, the record must reflect the court has considered those facts and circumstances in setting *its* maximum term of physical confinement even though that term may turn out to be the same as would have been imposed on an adult for the same offenses." (*Ibid.*) The record here does not reflect that the juvenile court considered the facts and circumstances of R.C.'s delinquency history in setting the maximum term of confinement. The matter must be remanded for this purpose.[2]

4. Failure to Send Defendant's IEP to the DJJ

The record clearly indicates, and the Attorney General concedes, that defendant was a special education student. It appears the juvenile court inadvertently failed to make this finding when it committed defendant to the DJJ. On remand, the juvenile court is directed to make this finding and comply with the requirements for providing defendant's current IEP and pertinent information concerning his educational needs to the DJJ. (*Angela M., supra*, 111 Cal.App.4th at pp. 1397-1399; Welf. & Inst. Code, § 1742.)

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[2] The issue of appellate review where the record is silent with respect to the juvenile court's exercise of discretion under Welfare and Institutions Code section 731, subdivision (c) is currently pending before the California Supreme Court in *In re Julian R.* (2007) 156 Cal.App.4th 1404, review granted February 27, 2008, S159282.

DISPOSITION

The judgment is affirmed. The matter is remanded to the juvenile court for proceedings consistent with this opinion.

NOT TO BE PUBLISHED

DUNNING, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.